

MARK K. ADAMS
BRUCE HALL
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DAVID W. BUNTING
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TARA L. EDMON
ELYSE A. ECKART
MATTHEW M. BECK

RODEY, DICKASON, SLOAN, AKIN & ROBB, P. A.

ATTORNEYS AT LAW
201 THIRD STREET NW, SUITE 2200
ALBUQUERQUE, NEW MEXICO 87102

P.O. BOX 1888
ALBUQUERQUE, NEW MEXICO 87103
WWW.RODEY.COM

TELEPHONE (505) 765-5900

FACSIMILE (505) 768-7395

OF COUNSEL
JOHN D. ROBB
ROBERT M. ST. JOHN
RICHARD C. MINZNER
JO SEXTON BRAYER
DEWITT M. MORGAN
CHARLES A. SEIBERT III
CYNTHIA A. LOEHR
PERRY E. BENDICKSEN III

BERNARD S. RODEY (1858-1927)
PEARCE C. RODEY (1889-1958)
DON L. DICKASON (1906-1999)
WILLIAM A. SLOAN (1910-1993)
JACKSON G. AKIN (1919-2010)

SANTA FE OFFICE
119 EAST MARCY STREET, SUITE 200
SANTA FE, NEW MEXICO 87501-2048
P.O. BOX 1357
SANTA FE, NEW MEXICO 87504-1357
TELEPHONE (505) 954-3900
FACSIMILE (505) 954-3942

WRITER'S DIRECT NUMBER
(505) 768-7217

KPURCELL@RODEY.COM

October 15, 2013

VIA E-MAIL AND U.S. MAIL

Jennifer D. Hall
Post Office Box 25687
Albuquerque, New Mexico 87125-0687

Re: Ortiz v. N.M. Dep't of Health
No. D-101-CV-2012-01876 (N.M. 1st Judicial Dist. Ct. Santa Fe County)

Dear Jennifer:

Pursuant to Rule 1-045(C)(2)(b)(i) NMRA, please accept this letter as an objection to the subpoena you served on Joey Peters of the Santa Fe Reporter on October 7, 2013. The subpoena essentially calls for all written or electronic communications between Mr. Peters and Plaintiff Robert Ortiz or his lawyers – as well as Mr. Peters' notes or recordings of any conversations with Mr. Ortiz or his lawyers – “from 2009 to the present.” Because the subpoena seeks on its face to invade the privilege that attaches to confidential communications between members of the press and their sources, neither Mr. Peters nor the Reporter will voluntarily comply with it.

Rule 11-514 of the New Mexico Rules of Evidence provides that

[a] person engaged or employed by news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public or on whose behalf news is so gathered, procured, transmitted, compiled, edited or disseminated has a privilege to refuse to disclose:

(1) the confidential source from or through whom any information was procured, obtained, supplied, furnished, gathered, transmitted, compiled, edited, disseminated, or delivered in the course of pursuing professional activities; and

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(2) any confidential information obtained in the course of pursuing professional activities.

Rule 11-514(B) NMRA. “[A] communication is ‘confidential’ if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional news media services or those reasonably necessary for the transmission of the communication.” Rule 11-514(A)(1). As this definition makes clear, the communications in which a journalist engages on the job, and the information he obtains from them, are confidential except to the extent that the journalist and his employer choose to publish them. But your subpoena asks for everything that Mr. Peters heard from Mr. Ortiz or Mr. Ortiz’s lawyers – along with everything that Mr. Peters told or wrote to Mr. Ortiz or the lawyers – except for Mr. Peters’ published stories about Mr. Ortiz. It is plainly invalid.

Rule 11-514 does create an exception to the privilege when

(1) a reasonable probability exists that a news media person has confidential information or sources that are material and relevant to the action;

(2) the party seeking disclosure has reasonably exhausted alternative means of discovering the confidential information or sources sought to be disclosed;

(3) the confidential information or source is crucial to the case of the party seeking disclosure; and

(4) the need of the party seeking the confidential source or information is of such importance that it clearly outweighs the public interest in protecting the news media’s confidential information and sources.

Rule 11-514(C). I would be happy to hear you out on why you believe that your subpoena comes within this exception. But I have a hard time understanding how it could. It is a dragnet that indiscriminately seeks to discover the entirety of Mr. Peters’ interactions with Mr. Ortiz or his lawyers during a four-and-a-half-year period. Even if each and every such communication were “material and relevant” to Mr. Ortiz’s lawsuit, discovery addressed to Mr. Ortiz himself would obviously be an “alternative means” of obtaining the information you seek. Nor does it appear likely that the information is “crucial” to your case. And even if it were, you would be required to demonstrate that your need for the information “clearly outweighs the public interest” in protecting the news media’s ability to do its job. I don’t believe that you can meet that burden.

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For the reasons I've stated, I respectfully request that you withdraw your subpoena.

Sincerely,

A handwritten signature in black ink, appearing to read "C. Purcell". The signature is fluid and cursive, with a large initial "C" and a stylized "P".

Charles K. Purcell

cc: Diane M. Garrity
Paula E. Ganz